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NO. 85-406

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1985

GEORGE R. ARIYOSHI, GOVERNOR, STATE OF HAWAII, *et al.*,

Petitioners,

vs.

SELWYN A. ROBINSON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS McBRYDE SUGAR COMPANY, LIMITED, AND SMALL OWNERS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the federal courts have jurisdiction to protect against a state court's uncompensated sua sponte taking of vested property rights after the state court has refused to consider or decide timely-made constitutional claims resulting from the taking?

2. Did the court below properly decline to give preclusive effect to the final judgment of a state court insofar as the judgment was tainted by the state court's summary rejection of all attempts by respondents to secure an opportunity to litigate fairly their constitutional claims in a due process hearing?

3. Did the court below properly rule that respondents, by their substantial expenditures and many years of reliance on *Territory v. Gay*, 31 Haw. 376 (1930), *aff'd*, 52 F.2d 356 (9th Cir.), *cert. denied*, 284 U.S. 677 (1931), acquired *de jure* vested rights that cannot now be divested without just compensation?*

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*The listing of parent companies, subsidiaries and affiliates required of respondent McBryde Sugar Company, Limited, by Rule 28.1 of the Rules of the Supreme Court was annexed to the Appearance Form previously filed in this case on behalf of McBryde Sugar Company, Limited.

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BRIEF OF RESPONDENTS McBRYDE SUGAR COMPANY, LIMITED, AND SMALL OWNERS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents McBryde Sugar Company, Limited ("McBryde") and Small Owners[1] respectfully request that this Court deny the petition for a writ of certiorari.

[1] Ida Albarado, Helen B.H. Chu, Henry J. Chu, Chee Kung Fui Society, Lapaz Francisco, Marcellino Francisco, Albert K. Kaailau, Linda P. Kaiakapu, Ann N. Kali, Harriet U. Kano, Junichi Kano, Kiyoshi Kimata, Arnold W.F. Leong, Katherine A. Leong, Lo Sun D. Leong, Tai Hing Leong, Hanayo T. Naumu, Wallace A. Naumu, Hideo Nonaka, Hiromi Nonaka, Iwao Nonaka, Kazuo Nonaka, Masatoshi Nonaka, Shigekichi Nonaka, Takano Nonaka and Takao Nonaka.

STATEMENT OF THE CASE

McBryde has owned and operated a sugar company on the Island of Kauai, Hawaii, since 1899. Although McBryde owns significant land areas in the Hanapepe (Hahnahpaypay) Valley on Kauai (App. 218a-219a, 235a-236a), the bulk of its agricultural land extends to the east of Hanapepe. Sugar cane cultivation requires a substantial, continuous supply of water. All but 300 of the 5,955 acres cultivated by McBryde on its sugar plantation are irrigated. App. 83a. McBryde draws from its sources in Hanapepe an average of 20 million gallons per day, representing well over half of the irrigation supply for its entire sugar plantation. *Id.* McBryde transports its Hanapepe water through its private irrigation system for distances as far as 5½ miles outside of Hanapepe Valley. *Id.*

While some of McBryde's irrigation water comes from underground sources, over half of it is diverted from the Hanapepe River. *Id.* This case concerns McBryde's surface water rights. Those rights consist of (1) appurtenant water rights and (2) prescriptive water rights.

Appurtenant water rights are inherent in the ownership of ancient taro lands and entitle the owner of those lands to the quantity of water that was used to grow taro on the lands in 1848 when the king transferred the lands into private ownership. The ownership of appurtenant water rights can be severed from the ownership of the ancient taro land itself. App. 76a, 88a, 92a-95a, 235a-242a. Thus, McBryde's appurtenant water rights in Hanapepe derive from its ownership of ancient taro lands, from its reservation of the water rights from ancient taro lands that it formerly owned and from water rights acquired from third parties who retained title to their taro lands. App. 76a, 218a-219a. Because taro cultivation has declined markedly and because taro requires far more water than sugar and other crops, appurtenant water rights have considerable value for sugar and other uses.

McBryde acquired prescriptive water rights by continuous usage of stream waters in excess of its appurtenant water rights, under a claim of adverse possession for the requisite statutory

period. App. 257a, 260a. Prescriptive water rights diminish the share of water owned by other private parties, in this case Gay & Robinson ("G&R") as owners of the normal surplus flow of the Hanapepe streams.

Respondent Small Owners own ancient taro lands in Hanapepe and thereby have appurtenant water rights. Those water rights have value for their use on the land giving rise to the rights or on other lands or for their salability to other water users. App. 86a.

1. This Federal Case Was Born in the Hawaii Supreme Court.

For decades prior to the *McBryde*[2] decision, there was no dispute about the legal principles of Hawaiian surface water law creating and governing the surface water rights discussed above.[3] The case leading up to the *McBryde* decision originated

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[2] *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 504 P.2d 1330, *rehearing denied*, 55 Haw. 260, 517 P.2d 26 (1973); *appeal dismissed for want of jurisdiction, cert. denied*, 417 U.S. 962, 976 (1974).

[3] In fact, in March 1959 (the same month that McBryde commenced proceedings in state court for the determination of its water rights in Hanapepe), the Hawaii Water Authority submitted the following report on Hawaiian water law to the legislature in preparation for statehood:

> Surface-water rights in Hawaii are considered property rights and can be sold or acquired separately from the land to which they are appurtenant. The legal right in Hawaii to transport surface water from one watershed to another, not permitted under riparian water law, has made it possible to provide irrigation to Hawaii's water-deficient and generally better arable lands and develop a sound agricultural economy. Extensive developments of surface water have been accomplished under Hawaii's existing surface-water rights law. It can be concluded that the many court decisions have firmly established the principles of surface-water rights in Hawaii. It does not seem likely that any legislation enacted to materially alter existing surface-water rights law would be held constitutional by Hawaii's courts nor does there appear any need at this time for legislation to strengthen or change this system of surface-water law.

Hawaii Water Authority, *Water Resources in Hawaii* 64-65 (1959), *quoted at* App. 93a-94a. *See also* Report of the Water Commission of the Territory of Hawaii 19-20 (1917), *cited at* App. 94a & 130a-132a. *Cf. Kaiser Aetna v. United States*, 444 U.S. 164, 166 (1979) ("[H]awaiian fishponds, have always been considered to be private property by landowners and by the Hawaiian government.").

when G&R improved its upstream diversion system and, commencing March 28, 1949, began withdrawing so much water from the Hanapepe streams that the quantity remaining was insufficient to satisfy the appurtenant and prescriptive water rights of McBryde and the other downstream owners. App. 209a-210a. McBryde filed its action in the state court to determine and confirm its water rights and to enjoin G&R's diversion of waters belonging to McBryde. App. 216a-217a.

After several years of trial preparation, the trial in state court lasted more than three months, as reflected in a transcript of almost 3,500 pages plus voluminous exhibits. App. 60a. The State of Hawaii actively participated to determine its own appurtenant water rights in Hanapepe (including severed water rights). All parties and the trial court accepted G&R's ownership of the normal surplus water (after allowance for downstream appurtenant and prescriptive rights), as had been decreed in *Territory v. Gay*, 31 Haw. 376 (1930), *aff'd*, 52 F.2d 356 (9th Cir.), *cert. denied*, 284 U.S. 677 (1931). App. 60a, 250a. All parties and the trial court similarly recognized that water rights could be obtained by prescription, that water rights could be severed from land ownership and that waters could be freely transferred within and without the watershed of origin. App. 60a, 204a-217a. The state trial court awarded appurtenant water rights to McBryde, G&R, the State and the Small Owners, and prescriptive water rights to McBryde, and then awarded all surplus waters to G&R. App. 260a-261a.

On the appeals by McBryde, G&R and the State[4] to the Hawaii Supreme Court, the parties raised many issues concerning the correctness of the water quantities awarded by the trial court, but there was no issue as to: (1) G&R's ownership of the normal surplus; (2) the severability and transferability of water and water rights; or (3) the susceptibility of water rights to prescription. The Hawaii Supreme Court affirmed the trial

[4]The Small Owners and Olokele Sugar Company, Limited ("Olokele"), did not appeal or otherwise participate in the appellate proceedings before the Hawaii Supreme Court.

court's quantification of the parties' appurtenant water rights but then proceeded sua sponte, without the benefit of anything in the record[5] and contrary to a century of Hawaiian water law,[6] to adopt a doctrine of riparian rights and to decree that: (1) the State is the owner of all surface water, subject only to appurtenant water rights and the newly declared riparian rights, (2) surface waters could not be diverted outside the watershed of origin or separated from the land to which originally appurtenant, (3) there is no such thing as privately owned surplus water and (4) because of the state ownership of water, McBryde could have no prescriptive rights. App. 187a-199a.

2. The Hawaii Supreme Court Refused to Consider or Decide the Constitutional Issues that Gave Birth to this Federal Case.

McBryde and G&R filed timely motions for rehearing and motions for an opportunity to present evidence and argument on the constitutional claims engendered by *McBryde*. App. 62a, 353a. The Small Owners and Olokele, though not parties to the appeal, separately moved to vacate the opinion and requested an opportunity to present evidence. Exs. SC 59 & 61. The court, without any filing by the State, summarily denied any oppor-

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[5] Justice Marumoto, dissenting, called the attention of the majority to the fact that their "decision has no relation whatsoever to the judgment appealed from in this case, and is neither within the issues raised and tried in the circuit court nor within the questions presented and argued in this court." App. 189a. The issues reviewed and tried in the circuit court and argued in the state supreme court appeal in no manner disputed the established meaning of the facially irrelevant Stat. L. Kam III 81-94 (1847) or 1850 Stat. L. 202-04 (referred to in Petition at 4, 10, 11, 12, 16).

[6] The Hawaii Supreme Court simply overruled the great bulk of Hawaiian water law with sweeping strokes, such as "any contrary indications in our case law are overruled." App. 178a. We are at a loss to understand how one could consider this process "slow," "cautious" or "piecemeal," as characterized on page 5 of the Petition. Appendix B is a conservative listing of the Hawaiian precedents summarily discarded by *McBryde*.

tunity to present evidence. The court did order a limited rehearing[7]—confined to the briefing and argument of two questions of state law formulated by the court—but summarily rejected the private owners' efforts to include the litigation of constitutional claims in the rehearing. App. 4a-5a, 62a-63a. The court also refused to permit a court reporter to record the proceedings at the oral argument on the limited rehearing. App. 79a. Despite the parties' concerted efforts to urge their federal claims upon the Hawaii Supreme Court, that court steadfastly rebuffed all such efforts and curtly stated: "After careful consideration of the briefs and arguments presented at the rehearing, we find no reason to change the decision filed herein." App. 113a. The final judgment of the Supreme Court made no provision for remand or further hearings.

When McBryde and the Small Owners then filed an appeal and a petition for a writ of certiorari in this Court, the State of Hawaii, represented by the same Attorney General's office that now represents the current petitioners, filed a motion to dismiss.[8] The Attorney General represented to this Court in his motion that "[t]he Federal questions sought to be reviewed were neither timely nor properly raised nor expressly passed on by the Courts of Hawaii," App. A, at A-4, and that the *McBryde* opinion "does not mention, discuss or pass upon any Federal question." *Id.* at A-8. In the same vein, the Motion to Dismiss, App. A, at A-10, summarized the limited rehearing as follows:

> Oral argument was duly held limited to the issues specified in the order of June 18, 1973 [Ex. SC 66]. On December 20, 1973, a *per curiam* affirmation of its prior opinion entered on January 10, 1973, was entered by a majority of the Supreme Court finding "no reason to change the decision filed

[7]The District Court found this limited rehearing to be "almost farcical." App. 96a.

[8]Reprinted in Appendix A to this brief. The Motion to Dismiss filed in this Court is notably absent from petitioners' Appendix. Petitioners' characterization of the Motion to Dismiss at page 14 n.21 of the Petition seriously misrepresents the true substance of the motion.

herein." [App. 113a] The *per curiam* affirmation of the Supreme Court does not mention, discuss *or pass upon* any Federal questions. [Emphasis added.]

The Attorney General argued on the basis of his statement of facts that this Court lacked jurisdiction to review federal questions not decided by the state court. This Court apparently gave credence to the Attorney General's statement of facts and dismissed the appeal for want of jurisdiction. App. 111a, 417 U.S. 962 (1974).

3. The District Court and the Court of Appeals Properly Acted to Declare and Protect Vested Water Rights Belonging to Respondents.

a. District Court proceedings.

Respondents instituted this action in federal district court to protect their property rights from the uncompensated taking decreed by *McBryde*, alleging jurisdiction under 28 U.S.C. §§ 1331, 1343, 2201, and 2283, and 42 U.S.C. § 1983. The evidence at trial (admitted largely by stipulation) included the entire record of the *McBryde* case. That evidentiary submission was necessary to prove the negative; namely, for example, that none of the parties in state court had ever questioned the private ownership of surface waters nor the transferability of water and water rights and that the respondents received no semblance of a fair opportunity to litigate and defend their property rights.

In addition to the *McBryde* record, the District Court received evidence by way of testimony and voluminous documentation, that had been in part tendered in the rejected petitions for rehearing, and which the *McBryde* court never considered. As summarized in the findings by the District Court, that evidence showed: the long history of investments by respondents in elaborate diversion and irrigation systems; the history of Hawaiian case law since 1867 recognizing and solidifying private ownership and transfers of water rights; and consistent governmental recognition of private ownership and transportability of water through taxation, condemnations, governmental studies and reports, encouragement of irrigation,

and numerous transactions in which the State or the Territory acquired or disposed of water rights in the same way that it dealt with other property rights. App. 75a-95a.

After months of posttrial cogitation and labor, the District Court issued its opinion on October 26, 1977, concluding that respondents had significant vested property rights that were directly jeopardized by *McBryde*. App. 98a-102a. The court also concluded that in *McBryde*, respondents were "deprived of property rights without ever having had a fair and meaningful opportunity to defend against their being handed over to the State on a silver platter."[9] App. 96a. Accordingly, the District Court entered judgment (App. 263a-267a) granting declaratory and injunctive relief against enforcement of the portions of *McBryde* that divested private ownership of the normal surplus water and interfered with the transportability of water. The final determination of awards of prescriptive water and storm and freshet surplus water was left to the state courts for determination as not involving purely federal claims.

b. Court of Appeals proceedings.

Appellate proceedings before the Ninth Circuit Court of Appeals commenced in 1978. In what may well be an unprecedented phenomenon, Chief Justice William Richardson[10] of the Hawaii Supreme Court not only filed a brief as amicus curiae but also participated through counsel in oral argument. At oral argument counsel for amicus Richardson urged the Court of Appeals to certify questions to the Hawaii Supreme Court to ascertain the meaning and effect of *McBryde* under

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[9]Although petitioners now urge that the invocation by respondents of the "rehearing process" (Petition at 11) and the granting of additional time to file the petition for rehearing afforded due process to respondents (Petition at 24-25), at trial petitioners made no attempt to show that respondents ever had a meaningful opportunity to litigate their federally protected rights in state court or that respondents' claims were passed upon or permitted to be heard.

[10]Chief Justice Richardson was one of the three-member majority responsible for the *McBryde* decision.

state law. On April 28, 1981, the Court of Appeals did certify six questions (App. 414a-415a) to the Hawaii Supreme Court, and proceedings in the Court of Appeals were held in abeyance pending the responses. App. 413a.

Given Chief Justice Richardson's participation as amicus curiae on behalf of petitioners, respondents twice moved for his recusal from consideration of the certified questions. Those motions were denied, as was a motion to have an official court reporter at the oral argument on the certified questions. On December 29, 1982, one day before Chief Justice Richardson's retirement from the court, the Hawaii Supreme Court issued its opinion, authored by Chief Justice Richardson, in response to the certified questions. App. 14a-55a; *Robinson v. Ariyoshi*, 64 Haw. 641, 658 P.2d 287 (1982).

In its response to the certified questions, although the federal court record had been transmitted to the Hawaii Supreme Court, that court ignored the factual findings made by the federal court, none of which was challenged by petitioners on appeal. While conceding on the one hand that *McBryde* does not have res judicata effect against any particular diversions of water, App. 24a-25a, the court on the other hand adhered to its position that the *McBryde* rulings on water ownership and water diversion would have binding precedential effect in all courts in Hawaii. App. 28a.

The federal court record was supplemented with the briefs and other writings filed in the Hawaii Supreme Court concerning the certified questions, and the Court of Appeals allowed additional briefing and further oral argument. The Court of Appeals issued its decision on February 20, 1985, affirming the District Court "in all respects insofar as it declares the rights of the parties," App. 13a, but vacating the injunction as premature "[b]ecause the state officers in these proceedings have taken no steps to interfere with plaintiffs' property, and have denied that they are presently planning to take such steps." *Id.* The Court of Appeals also made it clear that "[t]he state must bring condemnation proceedings before it can interfere with vested water rights and the enjoyment of the improvements made in reliance thereon." *Id.*

REASONS FOR DENYING THE WRIT

1. The Issues Raised by the Petition Are So Unusual that They Are Unlikely to Recur.

The issue as stated by the Court of Appeals in this case is: "Can the state, by a judicial decision which creates a major change in property law, divest property interests?" App. 5a. The virtually obvious answer is "No."[11] Petitioners do not quarrel with that answer to that question. Thus, they do not quarrel with the result in this case insofar as it vindicates federally protected property rights. Rather, petitioners seek to challenge the method by which that result was achieved.

In this case respondents' vested water rights were divested and impinged upon by a sua sponte decision of the Hawaii Supreme Court reshaping a case before it in a manner never contemplated or suggested by any of the litigants. Despite the extensive efforts of the parties (other than the State) to call to the state court's attention that its decision was beyond both the claims of any party and the scope of the evidence and would, in fact, be contrary to the evidence if an evidentiary presentation were allowed, the state court refused to permit any hearing or evidentiary showing and refused to address or consider or permit the parties to litigate fairly any constitutional issues. Against this backdrop, respondents applied to the federal court for relief under 42 U.S.C. § 1983.[12] The federal court has granted relief declaring the vested rights of respondents and

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[11] *Brinkerhoff-Farris Co. v. Hill*, 281 U.S. 673, 680 (1930); *Hughes v. Washington*, 389 U.S. 290, 297 (1967) (Stewart, J., concurring).

[12] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

protecting those rights from taking without due process and just compensation.

Unless one assumes that state courts are prone to making radical decisions of property law without either first or subsequently permitting the property claimants to substantiate and defend their claims in a due process hearing, it is unlikely that the federal courts will be burdened with cases like this. Assuming that state courts in the process of making changes in property law or otherwise affecting property rights afford due process in considering and addressing constitutional claims presented to them, then aggrieved parties will have their direct rights of review to this Court, and relief in the other federal courts will generally not be available.

Respondents are not aware of any case akin to the present case, and petitioners have suggested none. Similarly, respondents are aware of, and petitioners suggest, no conflict among the circuits on any of the federal claims addressed in this case. Because the courts below confined themselves to the exercise of federal question jurisdiction and did not exercise diversity jurisdiction or pendent jurisdiction over state claims, their decisions do not conflict with the Hawaii Supreme Court in a manner sufficient to invite review by this Court. As hereinafter discussed, the decisions below also do not conflict with *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

2. Review of this Case Would Result in an Affirmance.

Admittedly, the probability of an affirmance does not compel denial of a petition for certiorari. However, given scarce resources of time and given the thoroughness and congruence of the decisions by both the District Court and the Court of Appeals, there appears to be little reason to review this case only to affirm it. Of necessity the record in this case is voluminous and its history, both before and during the litigation, is extensive. After laboring at length with the record, the District Court issued a comprehensive decision and judgment. App. 56a-

110a, 263a-270a. After a sojourn in the Court of Appeals in excess of six years, the case has the benefit of that court's careful consideration and decision. App. 1a-13a. So far as the issues raised by petitioners are concerned, the decision and analysis by the Court of Appeals do not differ materially from the decision and analysis of the District Court. The District Court has now entered its amended judgment as directed by the Court of Appeals.

Respondents are sensitive to the fact that the relationship between state court jurisdiction and federal court jurisdiction can be a difficult one in many situations. But not here. Despite the long, tortured history of this case, one fact shines through: the court of last resort in Hawaii announced for the first time a decision that (1) was based on points not anticipated and never argued by the parties, (2) was contrary to all preexisting law in the state,[13] and (3) cast a conclusive, adverse cloud on respondents' title to property without respondents ever having had a hearing or an adjudication to support the court's ruling. A federal court under these circumstances surely has jurisdiction to rule on respondents' due process rights. Once jurisdiction has been established, there is no need for this Court to pass further to the highly unusual facts that relate to this case alone and are unlikely to be repeated.

We think that state courts will rarely, if ever, follow in the footsteps of the *McBryde* court, but a reversal by this Court would condone the substantive and procedural irregularities of *McBryde* and suggest the opportunity to other courts to act likewise.

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[13] *See* Appendix B annexed hereto for a partial list of the preexisting state cases summarily overruled by *McBryde*.

3. The Arguments Stated in the Petition Are Wrong on Their Merits.

Respondents will address the following arguments presented by petitioners:

a) *District of Columbia Court of Appeals v. Feldman*[14] dictates reversal.

b) The state regulatory process triggered by *McBryde* has not run its course sufficiently to justify federal relief.

c) The operation of the "rehearings process" in *McBryde* precludes this case.

a. *Feldman* does not apply to the facts of this case.

The *Feldman* case involved bar applicants who unsuccessfully applied to the District of Columbia Court of Appeals for waiver of an accreditation requirement for admission to the District of Columbia bar. The applicants did not petition this Court for certiorari to review the denials of their applications. 460 U.S. at 482. Instead, they filed suits in the federal District Court generally challenging the constitutionality of the bar admission rule and also challenging the denial of their particular applications. *Id.* at 469 n.3. The federal court dismissed the suits as efforts to secure unauthorized review of the District of Columbia court's decisions. *Id.* at 470. The Circuit Court of Appeals reversed. This Court vacated and remanded, holding that the District Court was correct insofar as it refused to entertain the bar applicants' challenges to the denial of their particular applications but that the District Court did have jurisdiction to consider the general constitutional challenge to the bar admission rule.

Unlike the present case, *Feldman* involved constitutional claims that could have been raised and considered in the first

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[14] 460 U.S. 462 (1983).

instance by the District of Columbia Court of Appeals (equivalent to the Hawaii Supreme Court).[15] The federal District Court noted that the District of Columbia court "'could and would have entertained and determined'" the constitutional issues and was still willing to do so. *Id.* at 473 n.9. There was no indication that the District of Columbia court had *refused* to consider constitutional issues or had otherwise denied procedural due process to the bar applicants in the way it addressed their claims.

In an effort to bring the case within the purview of *Feldman*, petitioners make the invalid contention that the findings of the courts below that the Hawaii Supreme Court did *not* pass on respondents' constitutional claims are mere presumptions[16] by those courts. Petition at 20. Petitioners use the term "presumption of non-decision" in this context at least four times in their Petition (at 21 & 25) and refer at least four other times to what the courts below "presumed" about the proceedings in the Hawaii Supreme Court. Petition at 18, 20 & 27. But the opinions below reveal that the federal courts neither articulated nor intimated any such presumption. Rather, the District Court found that the Hawaii Supreme Court "refused" to consider or

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[15] Unlike *Feldman*, this case also involves a substantial evidentiary record beyond the scope of the record before the *McBryde* court. The *McBryde* court refused to admit or consider much of the evidence essential to respondents' federal claims.

[16] After recasting the federal court findings as a "presumption," petitioners seek to counter that presumption with their own presumption, contending that "the state court must *be deemed* to have 'rule[d], either explicitly or implicitly, on the merits of the constitutional question.'" Petition at 22. In addition to quoting *Ake v. Oklahoma*, 105 S. Ct. 1087, 1093 (1985), out of context, this position is directly contrary to the stance taken by the Hawaii Attorney General in 1974 in the Motion to Dismiss Appeal: "The *per curiam* affirmation of the Supreme Court does not mention, discuss or pass upon any Federal questions." Appendix A hereto at A-10. Also, "the highest State Court has failed to pass upon a federal question." *Id.* at A-11.

permit argument on the constitutional claims, App. 63a, 79a, 96a & 104a n.35, "paid no attention to plaintiffs' challenge to the constitutionality of its decision," App. 75a, "precluded argument or hearing," App. 78a, and "refused to have an official reporter present." App. 79a. Likewise, the Court of Appeals recognized that the state court "refused" to hear or consider constitutional issues, App. 8a & 9a, and "summarily rejected" attempts to address constitutional claims on rehearing. App. 5a.

Before this Court can adopt petitioners' notion of "presumption of non-decision," it will first need to disregard the Attorney General's prior judicial representations made to this Court, and also need to go behind the decisions below to make its own examination of the record. Such an examination will substantiate the invalidity of petitioners' argument. But we submit that this Court, in the exercise of its discretionary review, should not be called upon to make any such factual review in this singular situation that is unlikely ever to reoccur.

b. This case has nothing to do with state regulatory processes.

Petitioners' argument that this case is a premature interference in the state regulatory process[17] is nearly incomprehensible. The conduct of the Hawaii Supreme Court in *McBryde* was judicial, not administrative or regulatory. Any implication that the Hawaii Supreme Court was somehow acting as an administrative agency in *McBryde* is a novel thought and, at best, presents an issue not raised below.

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[17] Contrary to petitioners' assertion that the Court of Appeals "explicitly recognized that the regulatory machinery had not even been set in motion," Petition at 23, the opinion reveals that the court mentioned "administrative proceedings" only once, as an alternative to judicial action to take property. App. 6a. Lest there be any doubt, respondents have never contended, and do not now contend, that the decisions below exempt respondents from any proper exercise of the police power.

As recognized by the Court of Appeals, App. 6a, *McBryde*'s retroactive reversal of settled state property law clouded property titles and did not merely regulate usage of the property. As such, its impact was not hypothetical or tentative. On the record in this case, there is nothing abstract about petitioners' intentions to apply *McBryde*.[18] In their Proposed Findings of Fact and Conclusions of Law, at 5, filed with the District Court on July 9, 1976, petitioners revealed what they planned to do with the newly declared state ownership and control of surface water if the District Court denied relief to respondents:

> The sovereign state as the owner of all surplus water subject to the rights of owners of land having ancient appurtenant water rights and riparian water rights, would be in a position to utilize all surplus water for the most beneficial interest of the public. Hanapepe River will, except during extremely dry conditions, once again flow from the uppermost watershed in the Alakahi Swamp in Mt. Waialeale to the mouth of the stream into the ocean.

In short, petitioners would take respondents' water rights and allow "the natural flow of the stream without substantial diminution and in the shape and size given it by nature", as dictated by *McBryde*. App. 185a. Later before the Court of Appeals, petitioners reiterated their view that *McBryde* empowered them to stop respondents' water diversions. State Officers' Memorandum on the Documents Which Constitute the Judgment for Res Judicata Purposes Under the Law of Hawaii, at 4-5, filed Sept. 21, 1979. Even more recently, in their opening brief addressing the certified questions, petitioners stated unequivocally that the Hawaii Department of Land and Natural Resources "would enforce the ruling under *McBryde*." Opening Brief at 3, filed July 30, 1981.

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[18] Understandably, petitioners are not taking action to enforce *McBryde* because they were *enjoined* from doing so by the District Court's judgment entered on March 2, 1978. App. 263a, 266a.

c. The "rehearings process" was no substitute for due process in this case.

There is no reason to construe the decisions below as a wholesale invalidation of the state "rehearings process."[19] Respondents do not urge pervasive rejection of rehearings processes any more than the District Court intended to do so by characterizing the limited rehearing in *McBryde* as "almost farcical." App. 96a. So far as respondents' research discloses, *McBryde* is an isolated instance of a radical sua sponte disruption in property law followed by refusal to entertain a rehearing on the constitutional issues raised by the decision itself.

"A State may not grant preclusive effect to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 482 (1982) (footnote omitted). Procedural due process requirements are a matter of federal law[20] and may not be diminished simply because the state court retroactively specifies procedures that it deems adequate for evaluating respondents' claims. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982); *Vitek v. Jones*, 445 U.S. 480, 491 (1980); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978). As this Court explained in *Zimmerman Brush*, 455 U.S. at 432, "any other conclusion

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[19]The term "rehearings process" was coined by the Hawaii Supreme Court in its response to the certified questions. App. 34a. The opportunity to file a petition for rehearing is provided by rule of court, but, because not ordered to do so, the State filed no response to the private parties' federal claims, which claims were summarily denied by the court.

[20]The preclusive effect of *Territory v. Gay*, 52 F.2d 356 (9th Cir. 1931), *affirming* 31 Haw. 376 (1930), *cert. denied*, 284 U.S. 677 (1931), is also a matter of federal law. *Southwest Airlines Co. v. Texas Internat'l Airlines*, 546 F.2d 84, 94 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977); *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 715 (5th Cir.), *appeal dismissed, cert. denied*, 423 U.S. 908 (1975). All arguments of petitioners concerning the preclusive effect of *McBryde* fold in upon themselves by reinforcing the preclusive effect of *Territory v. Gay*.

would allow the State to destroy at will virtually any state-created property interest."

One simple reason why the "rehearings process" in *McBryde* did not equate with due process is that the "constitutional issues presented by the state court petitions for rehearing" did *not* "involve pure questions of law" (Petition at 26) as contended by petitioners. Rather, the sua sponte departure of the state court from the record and issues before it necessitated an evidentiary hearing as part of the "rehearings process." Respondents earnestly requested the opportunity to present evidence but were rebuffed by the state court at every turn. Much of the evidence proffered to and refused by the state court is precisely what was admitted into evidence and considered by the District Court.

CONCLUSION

Given the total failure and refusal of the Hawaii Supreme Court to address or consider the constitutional issues engendered by *McBryde*, there can be no serious question about the exercise of jurisdiction and the grant of relief by the courts below. This case does not merit review, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-1440, 73-1441, 73-1442

McBRYDE SUGAR COMPANY, LIMITED, and
OLOKELE SUGAR COMPANY, LIMITED, *Appellants,*

vs.

STATE OF HAWAII, et al., *Appellees.*

SELWYN A. ROBINSON, et al., *Petitioners,*

vs.

STATE OF HAWAII, et al., *Respondents.*

IDA ALBARADO, et al., *Petitioners,*

vs.

STATE OF HAWAII, et al., *Respondents.*

On Appeal from the Supreme Court of the State of Hawaii and Petitions for Writ of Certiorari to the Supreme Court of the State of Hawaii

MOTION TO DISMISS APPEAL FROM THE SUPREME COURT OF HAWAII

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On Appeal from the Supreme Court of the State of Hawaii and Petitions for Writ of Certiorari to the Supreme Court of the State of Hawaii

MOTION TO DISMISS APPEAL FROM THE SUPREME COURT OF HAWAII

Appellee-Respondent, State of Hawaii, moves this Honorable Court to dismiss the appeal herein on the following grounds:

(1) The Federal questions sought to be reviewed were neither timely nor properly raised nor expressly passed on by the Courts of Hawaii.

(2) The appeal does not present a substantial Federal question.

STATEMENT

In 1959, the present suit was instituted by McBryde Sugar Company, Limited ("McBryde") pursuant to Part III, Chapter 664, Hawaii Revised Statutes, to adjudicate the ownership of all waters of the Hanapepe Valley basin.

At the hearing before the trial Court, appellants and petitioners did not raise any Federal Constitutional questions, and the trial Court, on December 10, 1968, made a determination of the water rights of the landowners.[1] Although the trial court noted that diversions of water had occurred, the Court did not reach the legality of such diversions.[2]

Separate appeals to the Supreme Court of Hawaii were filed by McBryde, Gay & Robinson and the State of Hawaii, but no Federal Constitutional questions were presented. The issues involved were questions

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[1]All reference to appendix made herein refers to "Joint Appendix to Jurisdictional Statement and Petitions for Writs of Certiorari" submitted on behalf of Appellants and Petitioners. Decision (App. 4); Conclusions of Law No. 13 (App. 55-57).

[2]Decision, Findings 11 and 15 (App. 7, 8-9); Finding 30 (App. 13).

concerning the rights of landowners to appurtenant, riparian and surplus waters.

The brief of appellant McBryde Sugar Company, Limited, in the Supreme Court stated the questions as follows:

"QUESTIONS PRESENTED

1. Under Hawaiian law, what is the standard for determining lands entitled to ancient appurtenant water rights?
2. Can lands used for taro cultivation from time immemorial be denied an ancient appurtenant water right because they were not actually under taro cultivation on the date of the Land Commission Award, where there has been no proof of abandonment of the immemorial right and no proof of prescriptive use of those waters by others?
3. What lands, in addition to those found by the trial court to have ancient appurtenant water rights, are entitled to such a water right and, conversely, what lands held by the trial court to be entitled to ancient appurtenant rights are not so entitled?
4. What is the proper measure of the water duty of lands having ancient appurtenant rights in this case?
5. Is it proper to reduce the water duty of each acre of taro land found by the trial court to have an ancient appurtenant water right based upon usage of such lands for the cultivation of taro at the time of the Land Commission Awards by one-third to allow for either: (a) the fact that other lands, watered

by Hawaiian custom from time immemorial, were not actually in cultivation (that is, were fallow) at the time of the Land Commission Awards; or (b) for the fact that, in the opinion of the trial court, at least one-third of the very lands of the trial court had held were entitled to an ancient appurtenant water right were at all times lying fallow at the time of the Land Commission Awards (probably because of the decline in population at that time)?

6. Are prescriptive water rights to the flow of a stream to be measured only as of the driest five days in the whole fourteen-year three-month prescriptive period, or are such rights to be measured in normal dry weather flow conditions, and also at other flow conditions of the stream, based upon the actual proof of prescriptive usage at various river flow states over the entire prescriptive period?

7. What additional prescriptive water rights of McBryde should be awarded at each flow stage of the Hanapepe River?

8. Were certain of the water flow, diversion, and measurement figures adopted by the trial court erroneous?

9. Did the trial court err in refusing to follow the rule of *Carter v. Territory*, 24 Haw. 47 (1917) regarding the rights of owners of ahupuaas or ilis kupono along a stream to share in the storm and freshet waters of the stream pursuant to the doctrine of riparian rights and in refusing to award McBryde its riparian rights in the storm and freshet waters of Hanapepe stream?

10. Under the record in this case, what is the dividing line between the normal daily surplus flow of the stream (owned by G&R) and the storm and freshet surplus flow of the stream (to be shared by G&R, the State and McBryde)?
11. If this court decides to overrule *Carter v. Territory,* what rule of law should be established for surplus waters?"

The brief of Gay & Robinson stated the questions on appeal as follows:

"QUESTIONS PRESENTED

1. Did McBryde, by taking water belonging to the State and other land owners, for a 10-year period acquire a prescriptive right to take the water which G&R was entitled to and in fact continued to take during the 10-year period?
2. Did the circuit judge err in enjoining G&R from diverting an unascertained quantity of water contrary to HRCP 65(d)?
3. Did the circuit judge err by making a double allowance for ditch losses allowing each owner of appurtenant water rights to take 50,050 gpapd (gallons per acre per day) measured at any point along or at the end of the ditches as well as at the point the ditches divert water from the river, when the court had already increased the rights of these owners 15% to allow for the losses in ditches in arriving at the figure of 50,050 gpapd?"

The brief of the State of Hawaii stated the questions on appeal as follows:

"STATEMENT OF THE QUESTIONS INVOLVED

1. What is the quantum of proof necessary to show that certain lands were in taro cultivation since time immemorial and as such are entitled to appurtenant water rights?
2. What is the quantity of water necessary to raise taro as it was done in ancient time as measured in gallons per acre per day?
3. Where land is claimed to be ancient taro land which is entitled to appurtenant water right, what is the critical period that such land must have been in taro culture in order that the water right may become vested?
4. Where land owned by the king in ancient time was in taro culture, is it necessary that such land be in taro culture at the time that adjoining taro lands were granted under Land Commission Awards, in order that such sovereign land be vested with appurtenant water rights?
5. Is there a distinction between normal surplus water and storm and freshet water? Assuming that there is a distinction, is the law the same on the ownership thereof?"

The opinion of the Supreme Court of Hawaii entered on January 10, 1973, with one Justice dissenting, does not mention, discuss or pass upon any Federal question.

Petitions for rehearing were filed by McBryde and by Gay & Robinson. A "Motion for Partial Vacation of Opinion and for Opportunity to Present Evidence and Argument" was also filed by Olokele Sugar Company, Limited.

On June 18, 1973, the Supreme Court of Hawaii entered an order directing McBryde, Gay & Robinson, the State of Hawaii and the Small Owners to file briefs limited to the issues as follows:[3]

"1. The pertinent portion of HRS §7-1, which was first enacted on August 6, 1850, Laws 1850, and which has been in our statute books ever since, reads:

'The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and water-courses, which individuals have made for their own use.'

Is the foregoing statute material to the determination of the water rights of the parties in this case? If so, why, if not, why?

2. The parties in this action introduced evidence as the record shows, to show that parcels of land in the Hanapepe Valley were entitled to appurtenant water rights for raising taro at the time of the Mahele or the Land Commission Award. The trial court found certain parcels were entitled to appurtenant water rights. Under what principle or theory of law are the owners entitled to apply the appurtenant water rights to parcels of land other than that to which the court found the right was appurtenant?"

On June 29, 1973, Olokele was also ordered by the Court to file a brief directed to the same issues.

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[3]Order of June 18, 1973 (App. 108-109).

Oral argument was duly held limited to the issues specified in the order of June 18, 1973. On December 20, 1973, a *per curiam* affirmation of its prior opinion entered on January 10, 1973, was entered by a majority of the Supreme Court finding "no reason to change the decision filed herein."[4] The *per curiam* affirmation of the Supreme Court does not mention, discuss or pass upon any Federal questions.

QUESTIONS PRESENTED

1) Where federal constitutional questions are neither timely nor properly raised in proceedings to determine the rights of landowners to appurtenant, riparian, and surplus waters, and the Supreme Court of Hawaii does not pass on any federal question, does the jurisdiction of the United States Supreme Court attach on appeal from the state judgment?

2) Where the Supreme Court of Hawaii makes a determination of the rights of landowners to appurtenant, riparian and all surplus waters by construing for the first time a state statute and its decision is made upon a fair and substantial basis, does the jurisdiction of the Supreme Court of the United States attach on appeal from the state judgment?

3) Where a state statute involves the "rights of the people" to appurtenant, riparian and surplus waters, and the sole issue before the state courts is a determination of such water rights, is there a substantial federal constitutional question involved?

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[4] 55 Haw. at 260 (App. 114).

ARGUMENTS

I.

QUESTIONS WHICH APPELLANTS AND PETITIONERS SEEK TO HAVE REVIEWED WERE NEITHER PROPERLY RAISED NOR PRESENTED BELOW NOR DECIDED UPON BY THE SUPREME COURT OF HAWAII

In order for this Court to vindicate its jurisdiction to deal with the federal questions in this case, if any, this Court must inquire whether those questions were presented to the Supreme Court of Hawaii in such a manner that it was necessarily decided by the State Supreme Court when it affirmed its prior decision of January 10, 1973. If the questions were not so presented, then this Court has no power to consider it. See, *Bailey v. Anderson,* 326 U.S. 203, 206-207 (1945). Moreover, this Court has stated that when, as here, the highest State Court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the State Courts, unless the aggrieved party can affirmatively show the contrary. See, *Bailey v. Anderson,* supra; *Chicago I. & L. R. Co. v. McGuire,* 196 U.S. 128, 131-133 (1905).

In the separate appeals to the Supreme Court of Hawaii taken by McBryde, Gay & Robinson and the State of Hawaii, no Federal constitutional questions were raised. The issues involved were solely questions concerning the rights of landowners to appurtenant, riparian, and surplus waters.

Subsequent to the decision of the State Supreme Court on January 10, 1973, both appellants and peti-

tioners filed petitions for rehearing. However, in their petitions and briefs, although appellants and petitioners challenged the application of Hawaii Revised Statutes §7-1 to the determination of the water rights, at no time did they draw in question the validity and constitutionality of the statute itself. The opinion of the Supreme Court of Hawaii construes the applicability of Hawaii Revised Statutes §7-1 to the determination of the water rights of landowners; the opinion does not indicate that the State statute was drawn in question as being repugnant to the Constitution, nor does it appear from the opinion that a federal question was presented to or considered by the Court. Thus, even if this Court should find that federal questions were properly raised below, this appeal should be dismissed for failure of appellants and petitioners to explicitly attack the validity and constitutionality of the State statute and not merely its applicability. See *Charleston Fed. S. & Assn. v. Alderson,* 324 U.S. 182, 187 (1945).

Assuming *arguendo,* that federal questions were properly raised below, appellants and petitioners were not deprived of their constitutional right to a hearing pursuant to the Due Process Clause of the 14th Amendment.

Pursuant to the order of the Supreme Court of Hawaii entered on June 18, 1973, all parties to the action were directed to file briefs concerning (1) whether Hawaii Revised Statutes §7-1 is material to the determination of the water rights of the parties, and (2) under what principle or theory of law are

the landowners entitled to transport water. Appellants and petitioners were provided the opportunity to argue the validity and constitutionality of the State statute both in their briefs and upon oral argument. However, both appellants and petitioners chose to argue the applicability of Hawaii Revised Statutes §7-1 rather than its validity and constitutionality.

II.

THE DECISION OF THE SUPREME COURT OF HAWAII IS CLEARLY CORRECT AND NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED IN THIS APPEAL AS TO REQUIRE PLENARY CONSIDERATION

The Supreme Court of Hawaii, prior to rendering its opinion of January 10, 1973, reflected back to the time of the Great Mahele of 1848 and reviewed its past decisions rendered in *Peck v. Bailey,* 8 Haw. 658 (1867); *Haw. Com. & Sugar Co. v. Wailuku Sug. Co.,* 15 Haw. 675 (1904); *Carter v. Territory,* 24 Haw. 47 (1917); and *Territory v. Gay,* 31 Haw. 376 (1930). The Court also reviewed the Principles of the Land Commission, Stat. L. Kamehameha III 81 (1847), prior to making a determination of the rights of the people to appurtenant, riparian, and surplus waters. The appurtenant water rights determined by the Court are synonymous with the ancient water rights which attached to *kalo* (taro) land measured by the quantum of water necessary to cultivate taro under the ancient system of taro cultivation.

In rendering its opinion, the State Supreme Court acknowledged the importance of their decision stating:

> "This court, like the United States Supreme Court has 'rejected a doctrine of disability at self-correction.' Helvering v. Hallock, [309 U. S. 106, 121 (1940)]. We believe that the doctrine of stare decisis is subordinate to legal reasons and justice and we should not be unduly hesitant to overrule a former decision when to do so would bring about what is considered manifest justice . . ."[5]

The Supreme Court of Hawaii for the first time construed Hawaii Revised Statutes §7-1 in determining the rights of the parties to appurtenant, riparian, and all surplus waters and clearly defined water right laws which were in the shaded area as the result of *Territory v. Gay,* 31 Haw. 376 (1930), where the three Justices differed on the law.

In *Patterson v. McCormick,* 99 S.E. 401, 405 (1919), the Supreme Court of North Carolina was faced with construction of a will which could have been decided adversely to the plaintiffs were it not for a statute which changed the common law. The Court there stated:

> "Where the statute is explicit and has been overlooked, the doctrine of stare decisis does not apply . . . when the statute and the precedents conflict the statute controls. The Courts cannot by a line of erroneous decisions overrule the statute."

A state has the power to determine its own peculiar rules of property rights in waters within its boundaries by statutes and Court decisions. In *Erie Railroad*

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[5]Decision of January 10, 1973 (App. 72).

Co. v. Tompkins, 304 U.S. 64, 78 (1938), the Court stated:

> "Except in matters governed by the federal constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by the Legislature in a statute or by its highest court in a decision is not a matter of federal concern."

Since a determination of property rights is a matter of local concern, the decision of the Supreme Court of Hawaii in construing Hawaii Revised Statutes §7-1 should not be overturned. The decision of the Court is rendered upon a fair and substantial basis and no federal questions are presented as to require plenary consideration by this Honorable Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal be dismissed.

Dated, Honolulu, Hawaii,
May 23, 1974.

Respectfully submitted,
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By JOHNSON H. WONG,
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APPENDIX B
Partial List of Hawaii Cases Overruled by *McBryde*

The Hawaii Supreme Court's holding regarding the State's ownership of normal surplus water overruled the holdings of *Territory v. Gay*, 31 Haw. 376, 387-88 (1930), *aff'd*, 52 F.2d 356 (9th Cir.), *cert. denied*, 284 U.S. 677 (1931) (''While the king owned this ahupuaa, he had a right to apply the water to what land he pleased, but after the water courses were made . . . his conveyance of the land would include them . . . .' That ruling . . . is as applicable to the surplus waters of an ili kupono as it is to those of an ahupuaa.''), and *Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co.*, 15 Haw. 675, 680 (1904) (''Surplus water . . . is the property of the konohiki to do with as he pleases . . . .''). The holding conflicted with statements made in *Carter v. Territory*, 24 Haw. 47, 70 (1917) (''Where a stream flows through a single *ahupuaa* . . . the [normal] surplus waters of the stream belong to the *ahupuaa*.''), and *Foster v. Waiahole Water Co.*, 25 Haw. 726, 734 (1921) (Surplus water is the ''class of water which originally the chief or konohiki could dispose of at will irrespective of the rights of the other owners and tenants . . . .), and the reasoning of authorities recognizing the prescriptibility of konohiki rights, *e.g.*, *Kaneohe Ranch Co. v. Kaneohe Rice Mill Co.*, 20 Haw. 658, 666 (1911); *Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co.*, 14 Haw. 40, 61-62 (1902), 15 Haw. 675, 690 (1904), 16 Haw. 113 (1904). *See also Carter v. Territory*, 24 Haw. 47, 58 (1917) (''The appurtenant rights of *kuleanas* in government *ahupuaas* to water for irrigation are similar to those in privately owned *ahupuaas*, except that in the latter case they might be enlarged by adverse user.'')

The Hawaii Supreme Court's holding that normal surplus water may not be transported beyond the watershed of origin overruled *Territory v. Gay*, 31 Haw. 376 (1930), *aff'd*, 52 F.2d 356 (9th Cir.), *cert. denied*, 284 U.S. 677 (1931) (''This is a suit in equity instituted by the Territory of Hawaii for the purpose of restraining a diversion by the respondents of certain

waters from the valley of Koula by means of dams, ditches and pipelines to the arid lands of Makaweli . . . .'' 31 Haw. at 377. ''[N]o limitation . . . ever existed or was supposed to exist to [the king's] power to use the surplus waters as he saw fit . . . . During recent years konohikis have in many instances diverted from the ahupuaa the surplus water . . . .'' *Id.* at 385. ''[A]n injunction cannot be granted.'' *Id.* at 392 (Perry, C.J.). ''[Gay and Robinson] are legally entitled, by reason of their fee simple ownership of the sources of the water supply arising in the ilis of Manuahi and Koula to divert and use as their own, all the normal daily surplus waters of the Koula stream . . . .'', *Id.* at 405 (Parsons, J., quoting from the decision of the trial judge); *Foster v. Waiahole Water Co.*, 25 Haw. 726, 734 (1921) (''The water demised by the Kahana lease is properly termed ahupuaa, konohiki or surplus water and was never appurtenant to any particular part of the land . . . .''); and *Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co.*, 15 Haw. 675, 680 (1904) (''Surplus water . . . is not appurtenant to any particular portion of the ahupuaa.''). *See also In re Taxes, Waiahole Water Co.*, 21 Haw. 679 (1913) (Water rights transferred apart from a parcel of land by the konohiki are separately taxable.).

As to the transferability of appurtenant water, the Hawaii court overruled *Palolo Land & Improvement Co. v. Wong Quai*, 15 Haw. 554, 562 (1903) (''We think that the plaintiff may lawfully divert the water to which any unused [taro land] . . . is entitled . . . .''); *Wong Leong v. Irwin*, 10 Haw. 265, 271 (1896) (''[Appurtenant water may] be utilized in any manner, in any place, for any purpose . . . .''); *Horner v. Kumuliili*, 10 Haw. 174, 180 (1895) (''The right to use the water . . . gives the owner . . . the right to use that water as he chooses, and he may allow part of it or all of it to be used elsewhere . . . .''); *Lonoaea v. Wailuku Sugar Co.*, 9 Haw. 651, 665 (1895) (''We find no objection either in law or reason to allowing the owner of land which is entitled to water from transferring the same amount of water to other land . . . .''); and *Peck v. Bailey*, 8 Haw. 658, 666 (1867) (''[T]he defendant

had the right to use the water of his kalo [taro] land on other lands . . . .").

The Hawaii court's holding that the right to use water may not be prescripted because all water is owned by the State overruled *Kaneohe Ranch Co. v. Kaneohe Rice Mill Co.*, 20 Haw. 658, 666 (1911) ("The diversion, if continued for the period required by the statute of limitations under circumstances of hostility and otherwise so as to constitute an adverse use, would ripen into a right."); *Lonoaea v. Wailuku Sugar Co.*, 9 Haw. 651, 665 (1895) ("[T]he plaintiffs . . . are entitled to such amounts of water as they have acquired by prescription . . . ."); and *Davis v. Afong*, 5 Haw. 216, 224 (1884) ("A right by prescription can be acquired to the waters of a spring which come to the surface and make a pond and flow . . . into an auwai . . . ."). The holding conflicted with statements made in *Wong Leong v. Irwin*, 10 Haw. 265, 271 (1896) ("[T]he wrongful user might by long continuance ripen into a right. When once it has thus ripened into a right it becomes a superior and absolute right, no longer depending upon the location of the land . . . ."); and *Heeia Agricultural Co. v. Henry*, 8 Haw. 447, 448 (1892) ("We deem it to be well settled law in this Kingdom that the right to use water for irrigation purposes can be acquired by adverse and continuous use for twenty years.").